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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 LAURA A. LANGDON,  
11 Plaintiff,

12 v.

13  
14 MICHAEL J. ASTRUE, Commissioner  
15 of Social Security,  
16 Defendant

Civil No. 12-CV-2624 AJB (NLS)

**REPORT AND  
RECOMMENDATION FOR  
ORDER GRANTING  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND  
DENYING DEFENDANT'S  
CROSS MOTION FOR  
SUMMARY JUDGMENT**

(Dkt. Nos. 13 and 15.)

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19 Laura A. Langdon ("Plaintiff") brings this action pursuant to 42 U.S.C. § 405(g),  
20 seeking judicial review of the final decision of the Commissioner of the Social Security  
21 Administration ("Defendant") denying her claim for disability insurance benefits. (Dkt.  
22 No. 1.) This case was referred for a Report and Recommendation on the parties' cross-  
23 motions for summary judgment. *See* 28 U.S.C. § 636(b)(1)(B); (Dkt. No. 4.) After  
24 careful consideration of the moving papers, the administrative record, and the applicable  
25 law, the Court **RECOMMENDS** that Plaintiff's motion for summary judgment be  
26 **GRANTED** and that Defendant's cross-motion for summary judgment be **DENIED**.

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## I. BACKGROUND

### A. Evaluation of a Disability Under the Social Security Act

To qualify for disability benefits under the Social Security Act (“SSA”), an applicant must show an inability to engage in any substantial gainful activity because of a medically determinable physical or mental impairment that has lasted or is expected to last at least twelve months. 42 U.S.C. § 423(d). The Social Security Regulations establish a five-step sequential evaluation process to decide whether an applicant is disabled under the SSA. 20 C.F.R. § 404.1520(a); *Keyser v. Comm’r Soc. Sec. Admin.*, 648 F.3d 721, 724 (9th Cir. 2011).

The first step is to determine whether the applicant is engaged in substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i). If the applicant is not, then it must be ascertained whether the applicant is suffering from a severe impairment, or a combination of impairments that is severe, within the meaning of the Social Security regulations. 20 C.F.R. § 404.1520(a)(4)(ii). If the impairment or combination of impairments is severe, the third step is to find out whether the impairment or combination of impairments meets or equals one of the “Listing of Impairments” in the regulations. 20 C.F.R. § 404.1520(a)(4)(iii). If the applicant’s impairment or combination of impairments does meet or equal a Listing, the applicant must be found disabled. *Id.* If the impairment or combination of impairments does not meet or equal a listing, the fourth step is to ascertain whether the applicant retains the residual functional capacity (“RFC”) to perform his or her past relevant work. 20 C.F.R. § 404.1520(a)(4)(iv). Finally, if the applicant cannot perform past relevant work, the fifth step is to determine whether the applicant can perform any other work that exists in the national economy. 20 C.F.R. § 404.1520(a)(4)(v).

In addition, the SSA provides a special procedure for evaluating a disability claim based on a mental illness. 20 C.F.R. § 404.1520a. Those reviewing an application must follow a “special psychiatric review technique” that assesses the degree of the applicant’s functional limitation in four work-related areas. *Id.*; *Keyser*, 648 F.3d at 725. The areas

1 include “activities of daily living; social functioning; concentration, persistence, or pace;  
2 and episodes of decompensation.” 20 C.F.R. § 404.1520a(c)(3). The degree of limitation  
3 in the first three areas are rated using a five point scale: none, mild, moderate, marked,  
4 and extreme. 20 C.F.R. § 404.1520a(c)(4). The degree of limitation in the fourth area,  
5 episodes of decompensation, is rated by: none, one or two, three, four or more. *Id.* The  
6 Administrative Law Judge (“ALJ”) is required to incorporate pertinent findings and  
7 conclusions based on the psychiatric review technique into his or her decision and “must  
8 include specific findings as to the degree of limitation in each of the functional areas.”  
9 *Keyser*, 648 F.3d at 725.

10 Current SSA regulations describe nine categories of mental impairment. 20 C.F.R.  
11 § 404, subpt. P, app.1 § 12.00. Each Listing consists of a statement describing the  
12 disorder, a list of criteria that must exist to substantiate the presence of the particular  
13 disorder (paragraph “A” criteria), and a list of criteria that describes impairment-related  
14 functional limitations that are “incompatible with the ability to do any gainful activity”  
15 (paragraph “B” criteria). *Id.* A claimant’s mental disorder must satisfy both paragraph  
16 “A” and “B” criteria to meet or equal one of the Listings. *Id.* To satisfy the paragraph  
17 “B” criteria, the claimant’s mental impairment must result in at least two of the  
18 following: marked restriction of activities of daily living; marked difficulties in  
19 maintaining social functioning; marked difficulties maintaining concentration,  
20 persistence, or pace; or repeated episodes of deterioration or decompensation. *Id.*  
21 Additional criteria that describe impairment-related limitations (paragraph “C” criteria)  
22 are utilized for certain mental disorders if the paragraph “B” criteria are not satisfied. *Id.*

23 While the applicant carries the burden of proving eligibility for benefits at steps  
24 one through four of the five-step sequential evaluation process, the burden at step five  
25 rests with the agency. *Celaya v. Halter*, 332 F.3d 1177, 1180 (9th Cir. 2003). Applicants  
26 not disqualified at step five are eligible for disability benefits. *Id.* In making the  
27 determination, “the ALJ has a special duty to fully and fairly develop the record and to  
28 assure that the claimant’s interests are considered.” *Brown v. Heckler*, 713 F.2d 441, 443

1 (9th Cir. 1983); *Widmark v. Barnhart*, 454 F.3d 1063, 1068 (9th Cir. 2006).

## 2 **B. Procedural History**

3 Plaintiff filed an application for Social Security disability benefits on January 23,  
4 2009. Administrative Record (“AR”) 28. She alleges her condition rendered her unable  
5 to work on January 5, 2008. *Id.* The application was initially denied on May 1, 2009,  
6 and her request for reconsideration was denied on September 22, 2009. *Id.* Plaintiff filed  
7 a written request for a hearing on November 12, 2009 and the hearing was scheduled for  
8 November 17, 2010. *Id.* The hearing was bifurcated and testimony was taken from  
9 Plaintiff, a vocational expert, and an internist. *Id.* The hearing was continued for the  
10 court to subpoena missing medical records and for Plaintiff to attend a psychiatric  
11 consultative examination. *Id.* A second hearing took place on March 3, 2011. *Id.* In  
12 addition to Plaintiff, a medical expert and a vocational expert testified. *Id.* Based on the  
13 testimony and the documentary evidence, the ALJ issued a decision denying Plaintiff’s  
14 request for benefits. AR 28-39. Plaintiff then filed a request for review of the decision.  
15 AR 22. The Appeals Council denied the request for review, and the ALJ’s decision  
16 became the final decision of the Commissioner. AR 1-4; *Batson v. Comm’r Soc. Sec.*  
17 *Admin.*, 359 F.3d 1190, 1193 n.1 (9th Cir. 2004).

18 Plaintiff filed this complaint for judicial review of Defendant’s final decision.  
19 (Dkt. No. 1.) She argues that the ALJ failed to give specific and legitimate reasons for  
20 rejecting the opinion of her treating psychologist. (Dkt. No. 13-1 at 8.) She asks that this  
21 Court reverse the Commissioner’s decision, credit the treating psychologist’s opinion,  
22 and remand for further proceedings. *Id.*

## 23 **C. Documentary Evidence**

### 24 **1. Diabetes and Endocrine Associates (2007 - Present)**

25 Plaintiff was diagnosed with Type 1 diabetes when she was two years old. AR  
26 443. She became a patient at Diabetes and Endocrine Associates in 2007, when she  
27 transitioned from pediatric to adult care. AR 487. Plaintiff is primarily under the care of  
28 Dr. Raymond Fink, M.D., and Andrea Gaspar, PA-C, and uses an insulin infusion pump,

1 finger stick testing, and an injectable hormone to control her disease. AR 451. In June  
2 2009, Ms. Gaspar submitted a letter to the Department of Social Services in support of  
3 Plaintiff's disability application. AR 443. She noted that despite Plaintiff's best efforts,  
4 she has been unable to adequately care for own disease as an adult and she has had four  
5 severe hypoglycemic reactions requiring hospitalization since September 2007. *Id.* Ms.  
6 Gaspar opined that Plaintiff's mental illness limits her ability to focus and stay motivated  
7 and that she is unable to work full-time and manage her diabetes; however she can work  
8 part-time or go to school part-time and manage her disease. *Id.* Ms. Gaspar stated that  
9 Plaintiff is a highly motivated patient but if she were to become uninsured, she would fall  
10 into debt and may neglect her care. *Id.*

11 **2. Dr. Leonard Naiman, M.D., Non-Examining Physician (2009)**

12 Dr. Leonard Naiman completed a physical residual functional capacity assessment  
13 of Plaintiff in April 2009. AR 376. He concluded that Plaintiff did not have any  
14 exertional, postural, manipulative, or visual limitations; however due to past  
15 hypoglycemic episodes, Plaintiff should avoid heights and machinery. AR 377-80.

16 **3. Dr. Satya Tata, M.D., Psychiatric Centers at San Diego,**  
17 **Psychiatrist (August 2008 - Present)**

18 Dr. Sataya Tata, a psychiatrist at the Psychiatric Centers at San Diego, has been  
19 treating Plaintiff since August 18, 2008. AR 360. During her initial evaluation, Dr. Tata  
20 noted that Plaintiff's judgment was mildly impaired and she had fair impulse control. AR  
21 363-64. She diagnosed her with Generalized Anxiety Disorder ("GAD") and Major  
22 Depressive Disorder ("MDD") and gave her a Global Assessment of Functioning  
23 ("GAF") score of 55-65.<sup>1</sup> *Id.* Although Dr. Tata estimated that Plaintiff could reach her  
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25 <sup>1</sup>Psychologists and Psychiatrists use a Global Assessment of Functioning (GAF) to  
26 rate an individual's social, occupational, and psychological functioning. *Morgan v.*  
27 *Comm'r Soc. Sec. Admin.*, 169 F.3d 595, 598 n.1 (9th Cir. 1999). An individual with a  
28 GAF score between 41 and 50 demonstrates serious symptoms or serious impairments in  
social, occupational, or school functioning, such as the inability to keep a job. *Id.* A  
GAF score between 51-60 indicates moderate symptoms, including occasional panic  
attacks, or moderate difficulties in social, occupational, or school functioning, such as

1 treatment goals in four to six sessions, AR 365, Plaintiff continues to see Dr. Tata every  
2 two to three months for treatment. *See* AR 80, 536.

3 During her initial appointment, Plaintiff denied having anxiety or depression. AR  
4 360. During subsequent appointments, however, Plaintiff reported symptoms of anxiety  
5 related to going to school and finding a job. AR 359, 949. In general, Dr. Tata's  
6 progress notes from 2008 through 2010 indicate that Plaintiff was able to control her  
7 anxiety symptoms and was doing fairly well, although she was unable to find and keep  
8 full-time employment and her mother continued to assist her with daily activities. AR  
9 359, 618-20, 802-03.

10 In November 2009, Dr. Tata submitted a letter to the Department of Social  
11 Services in support of Plaintiff's application for reconsideration. AR 534. Dr. Tata  
12 indicated that even with a maximum dose of medication and therapy, Plaintiff had not  
13 been able to hold a full-time job and probably would not be able to do so in the future.  
14 *Id.* Additionally, she opined that Plaintiff's depression needed to be treated on a  
15 consistent basis in order for her to manage her diabetes. *Id.*

16 In April and October of 2010, Dr. Tata submitted mental impairment  
17 questionnaires to Plaintiff's counsel. AR 536, 610. In both she gave Plaintiff a GAF  
18 score of 45-55 and indicated that despite adherence to her treatment recommendations,  
19 Plaintiff's result was "not optimal." *Id.* Additionally, Dr. Tata noted that due to chronic  
20 severe anxiety, Plaintiff was incapable of living independently or having a full-time job.  
21 *Id.* She determined that Plaintiff was seriously limited in several mental abilities and  
22 aptitudes needed to do unskilled work, including maintaining attention for two-hour  
23 segments, maintaining regular attendance and being punctual, completing a normal  
24 workday and workweek without interruptions from psychologically based symptoms, and

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26 few friends, and conflicts with co-workers. *Tagger v. Astrue*, 536 F.Supp.2d 1170, 1173  
27 n.6 (C.D. Cal. 2008). An individual with a GAF score of 61-70 generally functions well,  
28 and has some meaningful interpersonal relationships, although the individual  
demonstrates mild symptoms, such as depressed mood, or some difficulty in social,  
occupational, or school functioning. *Id.* at 1173 n.7.

1 responding appropriately to changes in a routine work setting. AR 538, 612.  
2 Additionally, Dr. Tata's opinion was that Plaintiff was unable to meet competitive  
3 standards for making simple work-related decisions, performing at a consistent pace  
4 without an unreasonable number and length of rest periods, and dealing with normal  
5 work stress. *Id.* Finally, Dr. Tata indicated that Plaintiff had marked difficulties in  
6 maintaining social functioning and maintaining concentration, persistence, or pace. AR  
7 540, 614.

8 In 2011 and 2012, Dr. Tata's progress notes indicate that Plaintiff was looking for  
9 a job, but was not motivated, that she felt isolated, was sleeping a lot, and was not  
10 realistic about supporting herself. Additionally, she was suffering panic attacks and did  
11 not wish to continue using a therapist for her treatment. AR 896, 898, 899, 949. Dr. Tata  
12 submitted a medical source statement and evaluation form to Plaintiff's counsel in April  
13 2012, indicating that Plaintiff had an extreme restriction interacting appropriately with  
14 the public, and a marked restriction interacting appropriately with supervisors and co-  
15 workers, responding appropriately to work pressures in a usual work setting, and  
16 responding appropriately to changes in a routine work setting due to her severe anxiety in  
17 social situations. AR 926. Further, she stated that Plaintiff's ability to hold a job,  
18 manage her diabetes, and manage her finances were severely impaired due to Obsessive  
19 Compulsive Disorder ("OCD") and GAD. *Id.* Dr. Tata listed her prognosis of Plaintiff  
20 as "poor." AR 931.

#### 21 **4. Dr. Lindsey Alper, Ph.D., Psychologist (2005-2010)**

22 On April 11, 2005, Plaintiff was referred to Dr. Lindsey Alper, Ph.D., for  
23 individual psychotherapy for OCD, social phobias, and dependent personality disorder.<sup>2</sup>  
24 AR 758. She began seeing Dr. Alper once per week, however her frequency of visits  
25 were reduced to once every two weeks at some point during her therapy. AR 374. In her  
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27 <sup>2</sup>The Court notes that the administrative record does not contain Dr. Alper's  
28 medical records for 2008.

1 treatment records for 2009 and 2010, Dr. Alper consistently noted that Plaintiff refused to  
2 take responsibility for her life, waited for others to care for her, and expected others to  
3 change to accommodate her. AR 709-10, 720, 725, 727, 728, 730. Additionally, Dr.  
4 Alper indicated that Plaintiff “gives lip service to what she needs to do, but has no plan,  
5 no desire to move out of her comfort zone” and has tantrums when she does not get her  
6 way. AR 725-26. In 2009, Plaintiff acknowledged that her anxiety was preventing her  
7 from moving toward autonomy. AR 723, 730 Dr. Alper repeatedly recommended that  
8 Plaintiff attend group therapy, however Plaintiff did not follow through and admitted that  
9 she would not do so unless forced. AR 717, 719, 720, 722.

10 In March 2009, Dr. Alper submitted a short form evaluation of Plaintiff to the  
11 Department of Social Services. AR 375. Consistent with her treatment records, Dr.  
12 Alper’s responses indicated that Plaintiff had a sense of entitlement and believed others  
13 should take care of her. *Id.* Additionally, Dr. Alper noted Plaintiff made very little  
14 progress in therapy and was non-compliant with numerous treatment recommendations.  
15 AR 373. Dr. Alper opined that Plaintiff’s ability to maintain concentration, attention, and  
16 persistence, as well as her ability to respond appropriately to changes in a work setting  
17 were fair. *Id.* She also noted that Plaintiff’s ability to perform activities within a  
18 schedule and maintain regular attendance, and her ability to complete a normal workday  
19 and workweek without interruption from psychologically based symptoms was poor. *Id.*  
20 Finally, she indicated that Plaintiff’s judgment was moderately to severely impaired, she  
21 had a rigidity in beliefs and perceptions, she was irritable, aggressive, manipulative, and  
22 she had poor impulse control. AR 374-75.

23 In May 2009, Plaintiff informed Dr. Alper that her application for social security  
24 benefits was denied and she was trying to appeal. AR 724. Dr. Alper expressed concerns  
25 to Plaintiff that she thought going on disability would be counterproductive in enabling  
26 Plaintiff to enter into adulthood. *Id.* Ultimately, Dr. Alper agreed to write a report listing  
27 Plaintiff’s diagnosis and symptoms but she noted she did not feel Plaintiff was totally  
28 disabled. *Id.* In August 2009, Dr. Alper responded to a request for a report from the



1 Department of Social Services and stated that in her opinion, Plaintiff did not have any  
2 physical limitations, no memory or compensation defects, but her ability to persevere in  
3 tasks is impaired and she demonstrates an inflexibility that results in poor adaptation to  
4 demands. AR 517. Additionally, she submitted a note to the Department of Social  
5 Services in November of 2009 that stated “despite our work and the addition of  
6 medication for anxiety and depression, she has made very little progress.” AR 535.

7 **5. Dr. D. Williams, M.D., Non-Examining Physician (2009)**

8 Dr. D. Williams completed a psychiatric review technique form and a mental  
9 residual functional capacity assessment of Plaintiff in April 2009. AR 384, 395. Dr.  
10 Williams indicated that Plaintiff had moderate difficulties in maintaining social  
11 functioning and mild difficulties in maintaining concentration, persistence, and pace. AR  
12 392. Additionally, he noted that Plaintiff was moderately limited in her ability to  
13 complete a normal workday and workweek without interruptions from psychologically  
14 based symptoms and to perform at a consistent pace without an unreasonable number and  
15 length of rest periods, and she was moderately limited in her ability to interact  
16 appropriately with the general public. AR 396.

17 Dr. Williams noted that while Plaintiff’s therapist said she had a sense of  
18 entitlement, irritability if others do not care for her needs, and manipulative behavior,  
19 “these beliefs about herself do not equate to a disability.” AR 394. Further, based on his  
20 administrative review, Dr. Williams did not find that Plaintiff was anxious, angry, labile,  
21 and only had fair concentration, as her therapist had indicated. *Id.* Dr. Williams opined  
22 Plaintiff was not severely impaired, but historically, Plaintiff tolerates stress poorly,  
23 therefore unskilled, non-public work is best for her. AR 394.

24 **6. Dr. Mounir Soliman, M.D., Seagate Medical Group, Examining**  
25 **Psychiatrist (2010)**

26 At the request of the Department of Social Services, Dr. Mounir Solimon  
27 performed a consultative psychological examination of Plaintiff on December 21, 2010.  
28 AR 778. During the exam, Dr. Solimon observed Plaintiff was pleasant and cooperative

1 and he determined she can cook, clean, shop, and take care of her personal hygiene and  
2 financial responsibilities. *Id.* Additionally, she gets along with family, friends, and  
3 neighbors and can focus on daily activities. AR 780. Dr. Solimon noted that Plaintiff's  
4 mood was depressed and she showed neurovegetative signs and symptoms for decreased  
5 concentration and energy. AR 781. He diagnosed her with major depression and gave  
6 her a GAF score of 66. *Id.*

7 Dr. Solimon concluded that Plaintiff can understand, carry out, and remember  
8 simple and complex instructions and is able to interact with co-workers, supervisors, and  
9 the general public. AR 782. He ascertained that she can "withstand the stress and  
10 pressures associated with an eight-hour workday, and day-to-day activities." *Id.* While  
11 Plaintiff has a history of depression and anxiety, Dr. Solimon stated her symptoms are  
12 treatable and manageable as an outpatient. *Id.*

#### 13 **D. Hearing Testimony**

##### 14 **1. Plaintiff's Testimony**

15 Plaintiff testified at both hearings in front of the ALJ. *See* AR 48, 73. During the  
16 first hearing, Plaintiff stated she began seeing Dr. Tata in 2008 and was continuing to see  
17 her every couple of months. AR 48-49. Additionally, she started seeing her therapist,  
18 Dr. Alper, in 2005, but she stopped seeing her in June 2010 due to vacation issues. AR  
19 49. The ALJ also reviewed Plaintiff's employment history with her and Plaintiff  
20 indicated she was working as a part-time cashier at Target, earning approximately \$200-  
21 300 per month. AR 55. She stated her only other form of financial support was from  
22 food stamps, which she had been receiving since July 2010. AR 58.

23 At the second hearing, Plaintiff testified she lived with her mother and sister in El  
24 Cajon and was currently engaged to be married. AR 73. While she stated she had a few  
25 friends, she said she mostly talked to them online or on Facebook and did not see them in  
26 person very often. AR 74. She said she did not belong to any social groups and when  
27 she was with her boyfriend, they would normally sit around and play on the computer,  
28 watch television, or play video games. AR 83. She said she had not taken any college

1 courses since 2009 because she did not feel she could afford it and she would rather  
2 spend time with her boyfriend. *Id.* Plaintiff also indicated that she believed she was  
3 emotionally over-dependent on her boyfriend. *Id.*

4 Plaintiff testified that she was able to shower and take her medication without  
5 being reminded. AR 75. She said she did not work full time because it made her anxious  
6 and she could not handle the stress of being around other people. *Id.* Although Plaintiff  
7 stated she never had a full-time job, she said she did not think she would be able to make  
8 it through an eight-hour shift due to the stressors and availability of being there all day  
9 long. *Id.* Additionally, she said she calls out a lot from her current job because she is  
10 depressed, anxious, or would rather be at home with her boyfriend or mother. AR 74-75.

11 Plaintiff stated she began receiving mental health treatment at the San Diego  
12 Psychiatric Centers in 2004 or 2005 because she was depressed and having “bad thoughts  
13 of OCD, suicide.” AR 78. She said she was taking Cymbalta for depression and Buspar  
14 for anxiety and that the medication was helping with her symptoms of anxiety and  
15 depression, but not as much as she wanted it to. AR 76. She stated she had anxiety  
16 attacks at work and dealing with the public made her flustered. AR 77. In addition to her  
17 psychiatrist, Plaintiff testified she also saw a psychologist from June 2008 through 2010.  
18 She said she normally would not do what her psychologist recommended, but she told her  
19 everything was okay because Plaintiff did not want to be in trouble. AR 81.

## 20 **2. Medical Expert Testimony**

### 21 **a. Dr. John Morse, M.D.**

22 Dr. John Morse testified as an impartial medical expert (“ME”) at the first hearing  
23 held on November 17, 2010. AR 59. He concluded that Plaintiff’s primary impairment  
24 was Type I, insulin dependant diabetes mellitus. AR 60. Although it does not meet or  
25 equal any Social Security Disability Listings, Dr. Morse stated her disease does impose  
26 limitations on Plaintiff’s ability to work. AR 61. Due to her history of hypoglycemic  
27 issues, Dr. Morse indicated that Plaintiff should avoid exposure to hazardous machinery  
28 and heights. AR 61-62.

1                                   **b.     Dr. Miriam Sherman, M.D.**

2           Dr. Miriam Sherman testified as an ME at the second hearing held on March 3,  
3 2010. AR 84. After reviewing Plaintiff's medical history, listening to her testimony, and  
4 questioning her during the hearing, Dr. Sherman concluded that Plaintiff had a major  
5 depressive disorder, a generalized anxiety disorder, and a personality disorder not  
6 otherwise specified ("NOS"). AR 88. Dr. Sherman noted that the mental impairment  
7 questionnaires filled out by Plaintiff's treating psychiatrist, Dr. Tata, were discordant  
8 with Dr. Tata's own narrative about Plaintiff's condition. AR 90. Additionally, Dr.  
9 Sherman stated that Plaintiff's treating psychologist, Dr. Alper, felt going on disability  
10 would be counterproductive for Plaintiff. *Id.* Dr. Sherman concluded Plaintiff had a mild  
11 restriction of activities of daily living, moderate difficulties maintaining social  
12 functioning, and moderate difficulties maintaining concentration with no episodes of  
13 decompensation. AR 91. Although she identified a severity of impairment that did not  
14 meet any Social Security Listings, Dr. Sherman opined that as a result of Plaintiff's  
15 combined condition, Plaintiff was limited to performing non-public simple repetitive  
16 tasks. *Id.*

17                                   **3.     Vocational Expert Testimony**

18                                   **a.     Katie Macy Powers**

19           Katie Macy Powers testified as a vocational expert ("VE") at the first hearing held  
20 on November 17, 2010. AR 63. She testified that Plaintiff was not eligible for entry into  
21 skilled work and did not have any past relevant work. AR 65. Therefore, she concluded  
22 that Plaintiff had no transferrable skills. *Id.*

23                                   **b.     Nelly Katsell**

24           Nelly Katsell testified as a VE at the second hearing on March 3, 2011. AR 93.  
25 She adopted Ms. Powers's relevant work analysis from the prior hearing as her own. AR  
26 94-95. In response to a hypothetical posed by the ALJ, Ms. Katsell stated that even if  
27 Plaintiff was required to avoid concentrated exposure to hazards and was limited to non-  
28 public simple repetitive tasks, a significant number of jobs remained in the occupational

1 base. AR 96. She provided three examples of available jobs, including an eye-dropper  
2 assembler, a garment folder, and a hand packager. AR 97. Plaintiff's attorney posed a  
3 second hypothetical and asked Ms. Katsell if Plaintiff would be precluded from all  
4 competitive work if she had a difficulty maintaining concentration, persistence and pace  
5 that seriously interfered with her ability to function appropriately, effectively, and on a  
6 sustained basis. AR 98. Ms. Katsell responded that it would. *Id.*

#### 7 **E. ALJ's Written Decision**

8 The ALJ issued a written decision on March 25, 2011. AR 28-39. He found that  
9 Plaintiff met the insured status requirements, and that she had not engaged in substantial  
10 gainful activity since the alleged onset date of her disability, January 5, 2008. AR 30.  
11 The ALJ also found that Plaintiff had the following severe impairments: diabetes  
12 mellitus, type I; major depressive disorder, generalized anxiety disorder, and personality  
13 disorder NOS. *Id.* The ALJ concluded that none of Plaintiff's impairments or  
14 combination of impairments met or equaled one of the listed impairments in 20 CFR Part  
15 404, Subpart P, Appendix 1. AR 31. In drawing this conclusion, the ALJ considered the  
16 expert testimony of Dr. Sherman and ascertained that Plaintiff's restrictions of daily  
17 activities were mild; her difficulties of maintaining social functioning were moderate; her  
18 difficulties of maintaining concentration, persistence, or pace were moderate; and she did  
19 not have any episodes of decompensation, which were of extended duration. AR 32.  
20 Because her mental impairments did not cause at least two marked limitations or one  
21 marked limitation and repeated episodes of decompensation, the ALJ determined the  
22 paragraph "B" criteria were not satisfied. *Id.* Additionally, the ALJ determined the  
23 evidence failed to establish the presence of paragraph "C" criteria. *Id.*

24 The ALJ also found that Plaintiff had the residual functional capacity to perform a  
25 full range of work at all exertional levels; however she should avoid even moderate  
26 exposure to hazards, machinery, and heights, and is limited to non-public simple  
27 repetitive tasks. *Id.* In making this determination, the ALJ analyzed whether there was  
28 "an underlying medically determinable physical or mental impairment" and whether that

1 impairment “could reasonably be expected to produce [Plaintiff’s] pain or other  
2 symptoms. AR 33. He then evaluated “the intensity, persistence, and limiting effect of  
3 [Plaintiff’s] symptoms to determine the extent to which they limit [Plaintiff’s]  
4 functioning.” *Id.* The ALJ concluded that Plaintiff’s allegations of disabling symptoms  
5 and limitations were not credible to the extent that they would prevent activity requiring  
6 non-public simple repetitive tasks. AR 37.

7 The ALJ rejected Plaintiff’s allegations of disabling symptoms and limitations for  
8 two reasons. AR 36. First, Plaintiff did not follow treatment or take medications as  
9 prescribed. *Id.* The ALJ opined that Dr. Alper reported Plaintiff made very limited  
10 progress in therapy, which indicated she had been non-compliant with treatment  
11 recommendations. *Id.* Additionally, the ALJ noted that Plaintiff testified she normally  
12 did not do what Dr. Alper recommended, and told people she was okay when she was not  
13 because she did not want to get in trouble. *Id.* Second, in his consultative examination of  
14 Plaintiff, Dr. Soliman determined Plaintiff could cook, clean, shop, run errands, take care  
15 of her personal hygiene and financial responsibilities, drive a car, and focus on daily  
16 activities. AR 36-37. Additionally, Dr. Soliman indicated that Plaintiff got along with  
17 family, friends and neighbors. *Id.*

18 During the hearing, Plaintiff’s counsel argued that Plaintiff would be unable to  
19 perform any work if she had difficulty maintaining concentration, persistence, or pace at  
20 a level and degree as to seriously interfere with her ability to function appropriately,  
21 effectively, and on a sustained basis. AR 37. In his decision, the ALJ determined he  
22 would not give controlling weight to the opinions of Dr. Tata or Dr. Alper as treating  
23 sources. *Id.* The ALJ noted that neither Dr. Tata’s nor Dr. Alper’s opinions were  
24 supported by objective evidence in the record and were inconsistent with other substantial  
25 evidence of record. *Id.* He noted that Dr. Alper reported Plaintiff’s concentration was  
26 intact, her memory was normal, and she had no significant impairment in concentration.  
27 *Id.* Additionally, Dr. Tata’s conclusion that Plaintiff had been unable to hold a full-time  
28 job despite a maximum dose of medication and therapy was “not supported by the totality

1 of the medical evidence of record, as well as her own progress notes.” *Id.*

2 The ALJ also concluded that Plaintiff had no past relevant work, was a younger  
3 individual (defined as one aged 18-49), and had a high school education and could  
4 communicate in English. *Id.* Transferability of job skills was not an issue because  
5 Plaintiff did not have past relevant work. *Id.* Based on her age, education, work  
6 experience, and residual functional capacity, the ALJ determined that Plaintiff was  
7 “capable of making a successful adjustment to other work that exists in significant  
8 numbers in the national economy.” AR 38. Examples of such jobs were provided by the  
9 vocational expert and included an eyedropper assembler, a garment folder, and a hand  
10 packager. *Id.* Accordingly, the ALJ found Plaintiff was not eligible for disability  
11 insurance benefits. AR 39.

## 12 **II. ANALYSIS**

### 13 **A. Standard of Review Regarding Substantial Evidence**

14 An unsuccessful applicant for social security disability benefits is permitted to seek  
15 judicial review of a final agency decision. 42 U.S.C. § 405(g). A reviewing court must  
16 affirm the agency’s decision if it is supported by substantial evidence and applies the  
17 correct legal standards. *Id.*; *Batson*, 359 F.3d at 1193. Substantial evidence means “more  
18 than a mere scintilla, but less than a preponderance; it is such relevant evidence as a  
19 reasonable mind might accept as adequate to support a conclusion.” *Andrews v. Shalala*,  
20 53 F.3d 1035, 1039 (9th Cir. 1995) *citing Magallanes v. Bowen*, 881 F.2d 747, 751 (9th  
21 Cir. 1989). If the evidence can support either affirming or reversing the agency’s  
22 decision, the court may not substitute its own judgment for that of the agency. *Robbins v.*  
23 *Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006). Further, if medical reports are  
24 inconclusive, questions of credibility and resolution of conflicts in the testimony are the  
25 exclusive functions of the agency. *Magallanes*, 881 F.2d at 751 (quotations omitted).

26 Where, as here, the Appeals Council denies a request for review, the ALJ’s  
27 decision becomes the final agency decision reviewed by the court. *Batson*, 359 F.3d at  
28 1193 n.1.

1           **B.     Assertion of Error**

2           In challenging the agency’s denial of benefits, Plaintiff argues the ALJ did not  
3 provide good reasons for rejecting her treating psychologist’s opinion that she exhibits  
4 limitations in adapting to full-time work. (Dkt. No. 13-1 at 10.) Plaintiff notes that in his  
5 summary of relevant evidence, the ALJ included a statement from Dr. Alper indicating  
6 that Plaintiff demonstrates an inflexibility resulting in poor adaptation to demands. *Id.* at  
7 8. While the ALJ stated that Dr. Alper found concentration and memory intact and  
8 normal before determining he would not give her opinion controlling weight, Plaintiff  
9 argues that intact memory and concentration do not implicate Plaintiff’s ability to adapt  
10 to the demands of substantial gainful activity. *Id.* at 9. Further, although the ALJ found  
11 that Dr. Tata’s findings were not supported by the totality of the medical evidence,  
12 including her own progress notes, those reasons do not apply to the opinions of Dr.  
13 Alper. *Id.* Plaintiff contends that the ALJ did not give any reasons for rejecting Dr.  
14 Alper’s view that Plaintiff is limited in her ability to adapt to substantial gainful activity.  
15 *Id.* at 10. Additionally, Plaintiff argues that Dr. Alper’s opinions that Plaintiff has a poor  
16 capacity for maintaining a schedule or completing a normal workday or workweek and a  
17 moderate to severe impairment in judgment were not rejected, included, or synthesized  
18 into the RFC articulated by the ALJ. (Dkt. No. 17 at 5.) Since the ability to adjust to  
19 other work is the focus of the five-step inquiry, Plaintiff argues the court should reverse  
20 and remand for consideration of Plaintiff’s limitation to adapt to full-time work, as  
21 described by Dr. Alper. (Dkt. No. 13-1 at 10.)

22           Neither of the parties dispute the ALJ’s findings at steps one, two, three, and five.

23           **1.     Step Four Analysis**

24           The RFC is an assessment of the claimant’s maximum remaining ability to perform  
25 “sustained work activities in an ordinary work setting on a regular and continuing basis,”  
26 despite the claimant’s medically determinable impairments. SSR 96-8p, 1996 WL  
27 374184 (July 2, 1996). In determining a claimant’s RFC, the agency must consider all  
28 relevant evidence in the record, including factors that may have a significant impact on



1 the claimant's ability to work. *Robbins*, 466 F.3d at 883; *Erickson v. Shalala*, 9 F.3d 813,  
2 817 (9th Cir. 1993) citing *Varney v. Sec'y of Health and Human Serv.*, 846 F.2d 581, 585  
3 (9th Cir. 1988). While the agency does not need to discuss every piece of evidence in its  
4 written decision, the agency is required to explain why significant probative evidence  
5 was rejected. *Vincent on behalf of Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir.  
6 1984); see also *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003).  
7 Additionally, if there are conflicting medical opinions as to the claimant's RFC, the  
8 agency may choose which opinion to credit and which to reject. SSR 96-8p. The agency  
9 is required, however, to provide an explanation of its determination. *Id.*; 20 C.F.R. §§  
10 404.1527(d)(2), 416.927(d)(2). The explanation must be "sufficiently specific" and make  
11 clear the reasons for the weight given to the treating source's medical opinion. SSR 96-  
12 2p, 1996 WL 374188 (July 2, 1996).

13 SSA regulations stipulate that the opinion of a treating physician on the nature and  
14 severity of the claimant's impairments be given controlling weight if the opinion is well  
15 supported by "medically acceptable clinical and laboratory diagnostic techniques" and is  
16 consistent with other substantial evidence in the record. 20 C.F.R. §§ 404.1527(c)(2),  
17 416.927(c)(2). While a treating physician's opinion about the claimant's physical  
18 condition or the existence of a disability is not conclusive, the agency must provide clear  
19 and convincing reasons for rejecting the treating physician's opinion if it is not  
20 contradicted by another doctor. *Magallanes*, 799 F.2d at 751; see also *Lester v. Chater*,  
21 81 F.3d 821, 830 (9th Cir. 1995). Even if the treating physician's opinion does conflict  
22 with that of another doctor, the agency must still provide "specific and legitimate"  
23 reasons supported by substantial evidence in the record for rejecting that opinion. *Lester*,  
24 81 F.3d at 830 citing *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). To meet this  
25 burden, the ALJ must do more than offer his or her conclusions; the ALJ must "provide  
26 detailed, reasoned, and legitimate rationales for disregarding the physician's findings."  
27 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988). Merely listing objective factors  
28 and stating that medical opinions are not supported by sufficient objective findings is not

1 enough. *Id.*; see also *Salvador v. Sullivan*, 917 F.2d 13, 15 (9th Cir. 1990) (summarizing  
2 the doctor's opinion without making any specific reference as to why it was disregarded  
3 is not sufficient).

4 As part of his determination of Plaintiff's RFC at step four of the sequential  
5 evaluation process, the ALJ provided a detailed summary of Plaintiff's own testimony  
6 and the medical records provided by her treating physicians. AR 32-35. Specifically, the  
7 ALJ noted that Plaintiff's treating psychologist, Dr. Alper reported that Plaintiff  
8 demonstrated an inflexibility that resulted in poor adaptation to demands. AR 34-35.  
9 Additionally, Dr. Alper indicated that Plaintiff's ability to perform activities within a  
10 schedule and maintain regular attendance, and her ability to complete a normal workday  
11 or workweek were poor. *Id.* The ALJ then summarized the findings of the State's  
12 medical consultants before rejecting Plaintiff's own allegations about the severity of her  
13 disabling symptoms and limitations. AR 36. The ALJ provided two specific reasons for  
14 rejecting Plaintiff's allegations; (1) Plaintiff did not follow treatment or take medications  
15 as prescribed by Dr. Alper; and (2) in his consultative examination of Plaintiff, Dr.  
16 Soliman reported claimant could cook, clean, shop, run errands, take care of her personal  
17 hygiene and financial responsibilities, drive a car, get along with family and friends, and  
18 focus on daily activities. AR 36-37.

19 During the second hearing, Plaintiff's counsel hypothesized that Plaintiff would be  
20 unable to work if it were determined that she had difficulty maintaining concentration,  
21 persistence, or pace at a level that would seriously interfere with her ability to function  
22 appropriately, effectively, and on a sustained basis. AR 37. Plaintiff's counsel supported  
23 his allegation by pointing to several exhibits containing the medical opinions of both Dr.  
24 Alper and Dr. Tata. *Id.* The ALJ reviewed the specified exhibits and stated they  
25 demonstrated Dr. Alper's opinion that Plaintiff's concentration was intact, her memory  
26 was normal, and she had no significant impairment in concentration. *Id.* Further, the  
27 exhibits included Dr. Tata's report that even with a maximum dose of medication and  
28 therapy, Plaintiff had been unable to hold a full-time job. *Id.* The ALJ proceeded to

1 reason that Dr. Tata's conclusions were not supported by the totality of the medical  
2 evidence of record, or her own progress notes, before stating he found no reason to give  
3 controlling weight to the opinions of *either* Dr. Tata or Dr. Alper as treating sources. *Id.*

4 While the ALJ specifically pointed to inconsistencies in Dr. Tata's own progress  
5 notes before concluding her opinion would not receive controlling weight, he did not do  
6 the same for Dr. Alper. *Id.* Rather, he merely concluded that Dr. Alper's opinions were  
7 not supported by objective evidence and were not consistent with other substantial  
8 evidence of record without providing "detailed, reasoned or legitimate rationales" for his  
9 conclusion.<sup>3</sup> Further, while the ALJ listed a number of Dr. Alper's opinions about  
10 Plaintiff's disabling symptoms and limitations in his summary of the record, it appears he  
11 only addressed Dr. Alper's view about Plaintiff's concentration and memory. The ALJ  
12 did not evaluate Dr. Alper's conclusions about Plaintiff's ability to adapt to demands, or  
13 to maintain a schedule and complete a normal workday or workweek. Without an  
14 explanation, this Court cannot tell if the ALJ rejected or simply ignored that evidence.  
15 While it appears the ALJ relied on the opinion of the State's medical consultant, Dr.  
16 Soliman, over Dr. Alper in making his conclusion that Plaintiff is capable of performing  
17 unskilled, non-public work, he did not explicitly reject Dr. Alper's opinions or give  
18 "specific and legitimate reasons" for crediting Dr. Soliman over Dr. Alper. *See Nguyen v.*  
19 *Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996) (failing to provide specific, legitimate  
20 reasons for discounting opinion of claimant's examining physician in favor of non-  
21 examining medical advisor was error); *Smolen v. Chater*, 80 F.3d 1273, 1286 (9th Cir.  
22 1996) (failing to offer reasons for disregarding opinions of two of claimant's treating  
23 physicians and making contrary findings was error). Although legitimate reasons for the  
24 ALJ's reliance on Dr. Soliman's opinions over those of Dr. Alper may exist, this Court is  
25 only permitted to review the explanation offered by the ALJ in his written opinion. *See*

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27 <sup>3</sup>Merely listing objective factors and stating that a medical opinion is not supported  
28 by objective findings does not meet the level of specificity required by case law. *Embrey*,  
849 F.2d at 421-22.

1 *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003). If the ALJ’s explanation is  
2 inadequate, the reviewing court may not search the record for reasons that support his  
3 decision. *Id.*

## 4       **2.     Crediting Opinion of Treating Psychologist**

5       Plaintiff argues that because the ALJ did not provide “good reasons” for rejecting  
6 Dr. Alper’s opinion, this Court should credit her opinion as a matter of law.<sup>4</sup> To  
7 determine whether evidence should be credited as a matter of law, the court must evaluate  
8 whether: (1) the ALJ provided legally sufficient reasons for rejecting the evidence; (2)  
9 there are outstanding issues to be resolved before a disability determination can be made;  
10 and (3) it is clear from the record that if the evidence were credited, the ALJ would be  
11 required to find the claimant disabled. *Harmen v. Apfel*, 211 F.3d 1172, 1178 (9th Cir.  
12 2000) *citing Smolen*, 80 F.3d at 1292. Here, the ALJ failed to provide any reasons for  
13 disregarding the opinion of Dr. Alper. He merely referenced her findings that Plaintiff  
14 demonstrated an inflexibility that resulted in poor adaptation to demands, and that her  
15 ability to perform activities within a schedule and maintain regular attendance, and her  
16 ability to complete a normal workday or workweek were poor. AR 34-35. Providing a  
17 summary of a medical opinion, without making specific reference to why it was  
18 disregarded, is not a sufficient statement of reasons. *Salvador*, 917 F.2d at 15. This  
19 evidence requires interpretation and analysis.<sup>5</sup> Once the ALJ has done so, a reviewing  
20 court can determine whether he gave the evidence its proper effect.

## 21     **III.   CONCLUSION**

22       A reviewing court has discretion to remand a case for further proceedings if

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24       <sup>4</sup>Plaintiff cites *Vasquez v. Astrue*, 572 F.3d 586, 594 (9th Cir. 2009) in support of  
25 her argument; however in *Vasquez*, the court did not address the application of the “credit  
as true” doctrine in situations where outstanding issues must be resolved before a  
disability determination can be made. *Id.*

26       <sup>5</sup>Restrictions on a claimant’s ability to adapt to changes in a routine work setting  
27 have the potential to affect the claimant’s RFC and therefore her ability to work. SSR 96-  
28 8p. Further, the determination of a claimant’s mental RFC is “crucial to the evaluation”  
of her capacity to perform substantial gainful activity when her impairment does not meet  
or equal a listing, but is nonetheless severe. 20 C.F.R. § 404, subpt. P, app.1 § 12.00.

1 additional proceedings would remedy the defects in the ALJ's decision. *Marcia v.*  
2 *Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990).

3 Based on a review of the record and consideration of the briefs submitted, the  
4 Court **RECOMMENDS** that Plaintiff's Motion for Summary Judgment be **GRANTED**  
5 and Defendant's Cross-Motion for Summary Judgment be **DENIED**. This Court  
6 **RECOMMENDS** that the final decision of the Commissioner be **REVERSED** and  
7 **REMANDED** to the Social Security Administration for proper evaluation of Dr. Alper's  
8 opinion and its effect on Plaintiff's claim for disability, and other further action that is  
9 deemed appropriate and consistent with this Report and Recommendation.<sup>6</sup>


10 The undersigned submits this Report and Recommendation pursuant to 28 U.S.C. §  
11 636(b)(1) to the United States District Judge assigned to this case.

12 **IT IS ORDERED** that no later than **July 31, 2013**, any party to this action may  
13 file written objections with the Court and serve a copy on all parties. The document  
14 should be captioned "Objections to Report and Recommendation."

15 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with  
16 the Court and served on all parties no later than **August 7, 2013**. The parties are advised  
17 that failure to file objections within the specified time may waive the right to raise those  
18 objections on appeal of the Court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir.  
19 1991).

20 **IT IS SO ORDERED.**

21  
22 DATED: July 9, 2013

23  
24   
25 Hon. Nita L. Stormes  
26 U.S. Magistrate Judge  
27 United States District Court

28 

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<sup>6</sup>The ALJ is also encouraged to develop the record further by obtaining Dr. Alper's treatment records from 2008.